

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BIDZIRK, LLC, DANIEL G. SCHMIDT,)
III, and JILL PATTERSON,)
)
Plaintiffs,)
)
v.) Civil Action No. 6:06-CV-109-HMH
)
PHILIP J. SMITH,)
) AMENDED MOTION FOR LEAVE TO
Defendant.) AMEND COMPLAINT
)

COMES NOW BidZirk, LLC (“BidZirk”), Daniel G. Schmidt, III (“Schmidt”) and Jill Patterson (“Patterson”), Plaintiffs in the above-captioned action, and pursuant to Fed. R. Civ. P. 15(a), file this their amended motion for leave to amend their complaint, and show the Court the following:

INTRODUCTION

Plaintiffs filed their motion for leave to amend their complaint on June 5, 2006. See Doc. 45. Plaintiffs advised the Court in their original motion that, subsequent to the filing of the complaint, Defendant had published new defamatory remarks on the internet. See Doc. 45, Exhibit 1. Subsequent to June 5, 2006, Defendant again published additional defamatory remarks, this time on a new website devoted specifically to maligning BidZirk, www.kingkongwrong.blogspot.com. See Exhibit 1. Plaintiffs seek to amend their original motion for leave to amend, to request leave to file a new and more inclusive proposed amended complaint.

ARGUMENT

Rule 15(a) of the Federal Rules of Civil Procedure provides, in pertinent part:

[A] party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

In exercising its discretion to amend, the Court should focus on factors like "undue delay, bad faith, or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, etc." Shiflet v. Allstate Ins. Co., 233 F.R.D. 465, 466 (D.S.C. 2006).

On June 7, 2006, Defendant published and continues to display statements on his kingkongwrong website that impeach the honesty, integrity, virtue, or reputation of Plaintiffs, which caused and continue to cause injury to their business or profession. See Exhibit 1. As a result of his actionable publications, Defendant has further libeled Plaintiffs, and Plaintiffs seek additional damages.

The new claims contained in Plaintiffs' proposed amended complaint are necessary to ensure Plaintiffs' full recovery in this action. See Shiflet, 233 F.R.D. at 466. The instant motion is not the result of undue delay, bad faith or dilatory motive on the part of Plaintiffs. Rather, it is the result of newly-arising facts. Allowing Plaintiffs to amend their complaint will not prejudice Defendant, and is unlikely to increase the amount of formal discovery required in this action. See, e.g., Berkeley-Dorchester Counties Economic Dev. Corp. v. U.S. Dep't. of Health and Human Svcs., 395 F. Supp. 2d 317, 325 (D.S.C. 2005) (holding that leave to amend was not prejudicial where significant factual developments had occurred since the plaintiff filed its initial complaint). The relief sought by Plaintiffs falls squarely within Rule 15(a)'s commandment that leave to amend be granted "when justice so requires."

CONCLUSION

WHEREFORE Plaintiffs respectfully request that the Court grant them leave to file their amended complaint. Plaintiffs' revised proposed amendment is attached as Exhibit 2.

This 28th day of June, 2006.

/s/ Kevin M. Elwell

KEVIN M. ELWELL
USDC Bar No. 9706

K.M. ELWELL, P.C.
111 East North Street
Greenville, South Carolina 29601
(864) 232-8060
(404) 759-2124 e-facsimile
kmelwell@kmelwell.com

Attorneys for Plaintiffs BidZirk,
LLC, Daniel G. Schmidt, III and Jill
Patterson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BIDZIRK, LLC, DANIEL G. SCHMIDT,)
III, and JILL PATTERSON,)
Plaintiffs,)
v.) Civil Action No. 6:06-CV-109-HMH
PHILIP J. SMITH,)
Defendant.) CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing MOTION
FOR LEAVE TO AMEND COMPLAINT upon the following parties by depositing same
in the United States Mail in a properly-addressed envelope with adequate postage affixed
to:

Philip J. Smith
601 Cleveland Street
Apartment 5-C
Greenville, South Carolina 29601

This 28th day of June, 2006.

/s/ Kevin M. Elwell

KEVIN M. ELWELL
USDC Bar No. 9706

K.M. ELWELL, P.C.
111 East North Street
Greenville, South Carolina 29601
(864) 232-8060
(404) 759-2124 e-facsimile
kmelwell@kmelwell.com

Attorneys for Plaintiffs BidZirk,
LLC, Daniel G. Schmidt, III
and Jill Patterson